Comments Template on EIOPA-CP-16-005 Consultation Paper on the request to EIOPA for further technical advice on the identification and calibration of other infrastructure investment risk categories i.e. infrastructure corporates		Deadline 16.May.2016 23:59 CET
Company name:	Association Française de Gestion financière (AFG)	
Disclosure of comments:	EIOPA will make all comments available on its website, except where respondents specifically request that their comments remain confidential. Please indicate if your comments on this CP should be treated as confidential, by deleting the word Public in the column to the right and by inserting the word Confidential.	Public
	Please follow the instructions for filling in the template: ⇨ Do **not** change the numbering in column "Reference". ⇨ Please fill in your comment in the relevant row. If you have no comment on a paragraph, keep the row empty. ⇨ Our IT tool does not allow processing of comments which do not refer to the specific paragraph numbers below. ○ If your comment refers to multiple paragraphs, please insert your comment at the first relevant paragraph and mention in your comment to which other paragraphs this also applies. ○ If your comment refers to sub-bullets/sub-paragraphs, please indicate this in the comment itself. **Please send the completed template to CP-16-005@eiopa.europa.eu, in MSWord Format, (our IT tool does not allow processing of any other formats).** The paragraph numbers below correspond to Consultation Paper No. EIOPA-CP-16-005.	
Reference	**Comment**	
General comments	First of all, we would like to state that we welcome the overall approach of EIOPA in this new consultation, in trying to further elaborate and adapt the framework within which infrastructure investments are treated under Solvency II, through an interactive dialogue with stakeholders and practitioners. We would like to mention below some of the key comments and suggestions developed in our response to this consultation:	

	- We believe that the sectorial scope of infrastructure corporates should cover sectors such as telecom infrastructure, which in particular includes high speed broadband networks that are key in many EU members' national investment plans, part of essential public services and often developed within a framework that satisfies the eligibility criteria. We also believe that the geographical scope shall extend to OECD and EEA, similar to infrastructure projects. - We propose that the qualifying criteria for revenue predictability, when such revenues are not funded by a large number of users, should also be considered as satisfied when the purchasers of goods and services provided by the infrastructure corporate or project, while unrated, feature a low and evidenced counterparty risk. - With regards to the contractual framework for infrastructure projects, we welcome the adjustements proposed by EIOPA, while stressing that option 2 is much more appropriate to address the actual security mechanisms through wich debt investors effectively monitor, protect and recover their credit exposure.	
Section 1.1.		
Section 1.2.		
Section 1.3.		
Section 1.4.		
Section 1.5.		
Section 2.		
Section 3.		
Section 4.		
Section 5.1.		
Section 5.2.		
Question 1.	**Question 1 (a)** We understand the methodology that you have applied. We believe that you have well determined what are the disadvantages of such a method (in particular the limited representativity of the sample). We suggest that further considerations for the calibration percentage are given on the analysis of the listed infrastructure funds and of the studies provided by the EDHEC-Risk Institute.	

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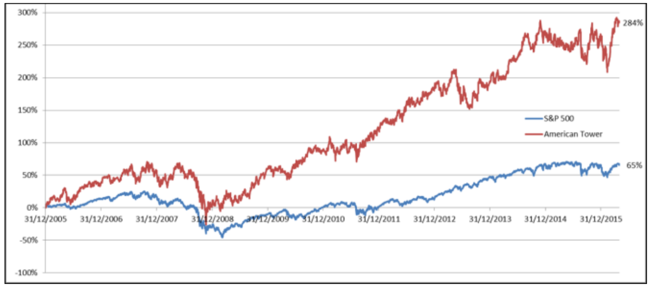
Section 5.3.		
Section 6.1.		
Section 6.2.		
Section 6.3.		
Section 6.4.		
Section 6.5.		
Section 7.1.		
Section 7.2.		
Section 7.3.		
Section 7.4.		
Section 7.5.		
Section 8.1.		
Section 8.2.		
Question 2.	**Question 2.a - Do you agree with the assessment of the risks of telecom investments as evidenced by the historical price data?** Similarly to the example used for airports where airport operators risk is distinguished from airline risk we do not think that the telecom sector should be excluded from the infrastructure corporates. The Juncker Plan has put focus on infrastructure telecom assets, the sector will develop in the near future: the EFSI will support investments for the development and deployment of information and communication technologies (ICT), telecommunications and digital infrastructures. In France, for example in line with the Plan Très Haut Débit, the development of high speed networks will largely be done in subsidized areas (Réseau d'Initiatives Publiques "RIP"). As a consequence, these investments in RIP will imply a long term contract with a public entity (concessions contracts with protective clauses and specific public grants) and also regulated tariffs for the wholesale market (Ex : ARCEP in France).	

By way of empirical evidence of the resilience of such companies to the economical cycles, please see below examples of listed pure-play communication infrastructure companies and their stock performance vs the relevant national indices over the past 10 years (or their first date of quotation if more recent).

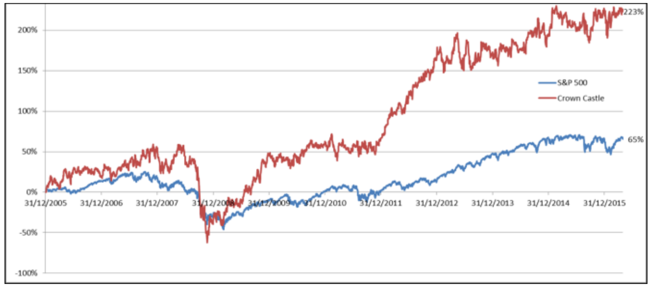
American tower vs S&P 500

01/01/2006 until 29/04/2016



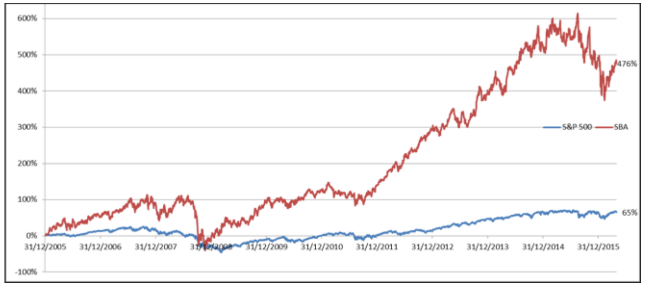
Crown Castle vs S&P 500

01/01/2006 until 29/04/2016



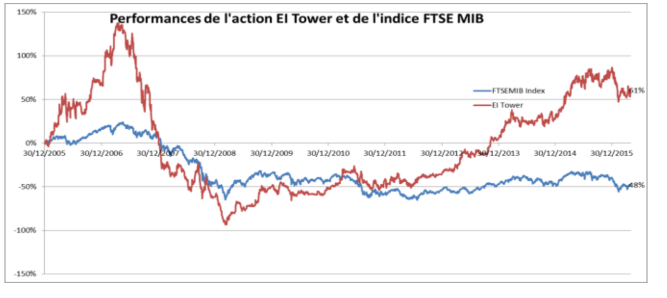
SBA vs S&P 500

01/01/2006 until 29/04/2016

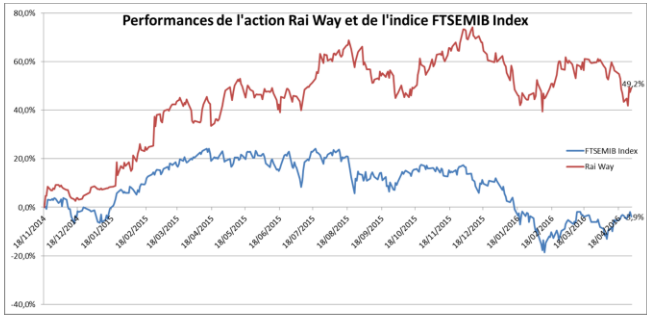


EI Tower vs FTSE MIB

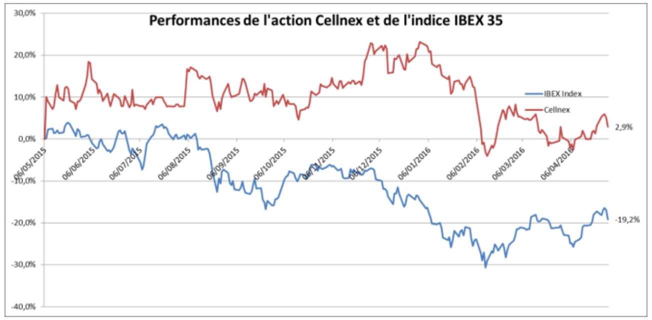
01/01/2006 until 29/04/2016



Rai Way vs S&P 500
28/11/2014 until 29/04/2016



Cellnex vs IBEX35
(06/05/2015 until 29/04/2016)



Question 2.b - Are there any segments within the telecom industry that are safer than other segments, which granular analysis? If yes, please provide a comprehensive justification deserve further and supporting evidence including data, ISIN codes and examples.

In the telecommunication sector, revenues may come from:

- The physical infrastructure in itself: e.g. towers, fixed line and fiber network (last mile & backbone / copper & fiber), cable network, data centers;
- The infrastructure management: operation and maintenance of the infrastructure, network operation center;
- Network services and related services: phone and data services, TV and radio stations, media content …

The revenues generated by the physical infrastructure and the infrastructure management are typical of the infrastructure asset class and will fall within Infrastructure Project or Corporate Infrastructure Project depending on the way they are structured. The commercial risks from the network services

	and related services could be classified as corporate risk because they evolve in a competitive sector with lower level of predictability on future cash flows.	
Question 3.		
Section 8.3.		
Section 8.4.		
Question 4.	**Question 4.a - Do you have specific examples of infrastructure sectors and corporate structures that would inadvertently fall outside this definition?** We are convinced that the regulatory framework that applies to insurance companies should not exclusively focus on infrastructures types that have been financed in the past even though analysing historical data provide relevant statistical information on the risk profile of the infrastructure investments. The regulatory framework should be flexible enough to take into account new types of infrastructures with less historical data available such as energy transition, transportation, telecommunications investments in order to avoid insurers being prevented to invest in those types of infrastructures that will have to be financed in the near future. We believe that the following sectors should be included: • Telecom infrastructure assets where revenues are regulated or contracted, in particular high speed boradbank networks, the development of which is a key component of the Junker plan. They are often developed and operated within a concession framework, with features that meet the eligibility criteria proposed for infrastructure projects. • Heating networks, that often feature caracteristics that meet the eligibility critera (including contracted or regulated revenues). This sector is also instrumental for many EU members efforts in the field of energy efficiency. • Storage of gas or oil and oil derivative products. We also believe that the definion should be broadended to all EEA or OECD countries, similar to what is proposed for corporate projects.	

(c) Regarding the requirement for a minimum number of years of operation or for an external credit assessment specifically, are there cases where would this lead to the exclusion of safer infrastructure corporates? If so, how would you propose to appropriately limit the construction or operating risks; would the requirements for infrastructure projects be appropriate for example?

While we agree that, as a general rule, there should be a minimal number of operating years, we believe that a 3 year period is adequate. In our opinion, the criteria should also address situations where the corporate entity with a shorter existence than required results from an event like the merger or the spin off of activities which individually meet the criteria.

As a matter of conclusion, we propose to make the following amendments to the proposed definition:

"Definition
'Infrastructure corporate' means an entity or group which derives the vast majority of its revenues from owning, financing, developing, or operating infrastructure assets in the EEA ***or in the OECD*** *in the following lines of business:*

- *generation, transmission****, storage*** *or distribution of ~~electrical~~ energy* ***(including gas, power, heat, oil and oil derivative products)****;*
- ~~*distribution or transmission of natural or petroleum gas;*~~
- *provision of water, wastewater****, waste treatment*** *or recycling services;*
- *transport networks or the operation of transport assets;*
- ***Telecommunications networks and infrastructures;***
- *social infrastructure.*

The assessment whether the conditions above are met should be based on the last reporting period for which figures are available or a financing proposal.In case a general credit assessment or an assessment for senior unsecured exposures issued by an ECAI for the infrastructure corporate exists it shall be assigned to a credit quality step of at least 3. Otherwise, the infrastructure corporate has been active in these lines of business for at least ~~five~~ ***three*** *years* ***unless the infrastructure corporate results from a corporate operation such as an asset carve out, a merger, a spin-off of activities or businesses existing for at least three years.***

	<u>Revenue predictability</u> *The revenues generated by the infrastructure assets shall meet the following conditions:* *1. One of the following criteria is met:* *(i) The revenues are availability-based;* *(ii) The revenues are subject to a rate-of-return regulation;* *(iii) The revenues are subject to a take-or-pay contract;* *(iv) The level of output or the usage and the price shall independently meet one of the following criteria:* *a. it is regulated;* *b. it is contractually fixed;* *c. it is sufficiently predictable as a result of low demand risk;* *2. Where the revenues are not funded by payments from a large number of users of the service, the party which agrees to purchase the goods or services provided by the infrastructure corporate shall be at least one of the following:* *(i) an entity listed in Article 180(2) of this Regulation;* *(ii) a regional government or local authority listed in the Regulation adopted pursuant to Article 109a(2)(a) of Directive 2014/51/EU;* *(iii) an entity with an ECAI rating with a credit quality step of at least 3* ***<u>or an entity whose capital structure allows it to meet its financial obligations with regards to the purchase of goods and services provided by the infrastructure project under very robust assumptions based on an analysis of the counterparty risk</u>****;* *(iv) an entity that is replaceable without a significant change in the level and timing of revenues.* *3. The revenues shall be diversified in terms of activities, geographical location, or payers, unless the revenues are subject to a rate-of-return regulation* ***<u>or the infrastructure corporate provides an essential service with significant barriers to entry</u>.”***	
Question 5.		
Section 9.1.		
Section 9.2.	We welcome the amendments to the Delegated Regulation amendment of 30 September 2015 suggested by the EIOPA which extend the scope of infrastructure project to “project like” corporates.	

We still have, however, the following comments on the suggested amendments:

Article 1 - Amending provisions

Definition of "infrastructure assets" – the definition shall not be restricted to "public services" which could be interpreted as providing services to governmental entities exclusively whereas services can be provided to private parties (either retail or corporates)

"'Infrastructure assets' means physical assets, structures or facilities, systems and networks that provide or support essential ~~public~~ services ***to retail or corporate users****."*

Article 164a – Qualifying infrastructure investments

(c) (a) –termination clauses which provide protection to debt or equity providers are limited to specific contractual arrangements with public entities (in compliance with the local applicable laws). It narrows significantly the scope of the infrastructure projects. We appreciate the exclusion of infrastructure where revenues are funded by payments from a large number of users or subject to a rate of return regulation.

We, however, strongly recommend to add another exclusion where the infrastructure competitive environment provides a monopolistic situation or significant barriers to entry which is one of the main characterictics qualifying an infrastructure asset (e.g. case of corporate unbundling their infrastructure assets from their operations). The sale of transmission grids by European utilities resulting from the 2nd and 3d Liberalization European directives (2003 and 2007 respectively) is symptomatic of the unbundling between energy generation and marketing activities. The latter can be subject to intense competition (Operating Company "OpCo") while the company providing the infrastructure (the "InfraCo") is by nature a monopolistic activity. What started as an EU-directive driven push to boost competition in the utility space, has inspired numerous replications across a number of different industries, the most obvious examples being (i) the creation of mobile telecom tower companies in Europe or (ii) the disposal of offshore gas pipelines by energy majors to infrastructure funds.

"(c) the infrastructure project is governed by a regulatory or contractual framework that provides debt providers and equity investors with a high degree of protection including the following:

(a) provisions that effectively protect debt providers and equity investors against losses resulting from the termination of the project by the party which agrees to purchase the goods or services provided by the infrastructure project entity unless one of the following conditions is met;

(i) the revenues are funded by payments from a large number of users

(ii) the revenues are subject to a rate-of-return regulation

(iii) The infrastructure project entity provides an essential services with significant barriers to entry

(b) there are sufficient reserve funds or other financial arrangements to cover the contingency funding and working capital requirements of the project;"

(c) (b) We suggest the following amendment in relation to the security package for investment in bond or in loans (see further explanations in question 7 below).

(i) debt providers have ***directly or indirectly*** *the benefit security to the extent permitted by applicable law in all assets and contracts that are critical to the operation of the project;*

(ii) Notwithstanding paragraph 1(i), where undertakings can demonstrate that security in all

assets and contracts is not essential for debt providers to effectively protect or recover the vast majority of their investment, other security mechanisms may be used. In that case, the other security mechanisms shall comprise of one or more of the following:

(a) pledge of shares,

(b) step-in rights,

(c) lien over bank accounts,

(d) control over cash flows,

(e) provisions for assignment of contracts

We suggest the following clarifications in 1. (f) (ii).

"(ii) where the infrastructure project entity is in the construction phase the following criteria shall be fulfilled by the equity investor, or where there is more than one equity investor, the following criteria shall be fulfilled by a group of equity investors as a whole:

– the equity investors have a history of successfully overseeing infrastructure projects and the relevant expertise;

– the equity investors have a low risk of default, or there is a low risk of material losses for the infrastructure project entity as a result of the their default;

– the ***interests of*** *equity investors are ~~incentivised to protect the interests of~~* ***aligned***

	with those of debt *investors* ***with regards to mitigation of the construction risk****;"* We strongly recommend to take into account the case where the counterparty is not a public entity and is not rated subject to the performance of a counterparty analysis to confirm its ability to meet its financial obligations. We suggest the following clarifications in 2. (b) which is in line with the financial structure wording proposed for qualifying the financial structure of infrastructure corporates. *(b) where the revenues are not funded by payments from a large number of users, the party which agrees to purchase the goods or services provided by the infrastructure project shall be one of the following:* *(i) an entity listed in Article 180(2) of this Regulation;* *(ii) a regional government or local authority listed in the Regulation adopted pursuant to Article 109a(2)(a) of Directive 2009/138/EC;* *(iii) an entity with an ECAI rating with a credit quality step of at least 3* ***or an entity whose capital structure allows it to meet its financial obligations with regards to the purchase of goods and services provided by the infrastructure project under very robust assumptions based on an analysis of the counterparty risk****;* *(iv) an entity that is replaceable without a significant change in the level and timing of revenues."*	

Question 6.	**Do you envisage any difficulties to distinguish between revenues stemming from infrastructure compared to non)infrastructure activities? Please justify your response.** We believe that such distinction should be achievable when the basic rule is to consider that revenues stemming from infrastructure are those revenues that are directly related to the operation of the infrastructure assets and that would not have been made possible without the existence and the operation of such assets. Non-infrastructure activities should therefore cover businesses that a corporate would have been able to undertake regarless of the existence of the infrastructure asset.	
Question 7.	**Question 7.a Would option 1 (compared to option 2) lead to the exclusion of arrangements which provide an equivalent level of protection to asset security and an equity pledge? Please provide specific reasons and examples.** We consider Option 1 would indeed lead to the exclusion of arrangements which provide an equivalent level of protection to asset security and an equity pledge. For the same reason, Option 2 is a more suitable solution as explained below. The modifications proposed in Option 1 and Option 2 (i) ("benefit of" security and "critical" instead of "necessary") are fully appreciated as they provide for some flexibility. However, in some cases, this condition may still not be applicable. For example, in the case of a Holdco financing, if there is no debt owned by the lenders at the Opco level, the lenders cannot have directly the "benefit of security" on the assets. In that case they usually benefit from other security mechanisms (that are described in Option 2 (ii)) and only benefit indirectly from security on critical assets and contracts. This may be done through a pledge over the Opcos' critical assets and contracts in favour of the Holdco combined with an assignment of the Holdco/Opcos intercompany loans in favour of the Lenders. Another example would be a "fiducie" where the lenders only benefit indirectly from security on	

	assets and contracts. In order to take this into account, we would suggest the proposed updated wording in (i) : > "Debt providers have **directly or indirectly** the benefit of security to the extent permitted by applicable law in all assets and contracts that are critical to the operation of the infrastructure project." In addition, in Option 1 (ii), it is stated that "debt providers are able to take control of the operation of the infrastructure project prior to default" which is not authorized under French law. This is even more the case if we consider a "default" and not a "payment default". **Question 7.b - Do you consider that a "negative pledge" clause can provides equivalent protection to the security arrangements required by the proposals in Section 9.3?** A "negative pledge" clause cannot provide equivalent protection to the security arrangements required by the proposals in Section 9.3 on a stand-alone basis. As a matter of fact, the negative pledge clause is usually combined with other types of clauses (described in Option 2 (ii)) in order to provide equivalent protection. For example, this is the case in countries where mortgage is very costly (Italy for example). In that context, Option 2 is again a more suitable solution as it offers the usual legal options that are available to secure the lenders.	
Section 9.3.		
Section 10.1.		
Question 8.		
Section 10.2.		
Annex I		

Annex I Questions	**Do you agree with the assessment of benefits? Are there other benefits that have not been identified?** As asset managers our members are in contact with investors that are keen to reinforce their exposure to infrastructure projects and are worried that the present regulation looks like an impediment on their way. We strongly believe it is essential from both a financial stability and an economic and growth point of view to finance infrastructures and long term projects with long term money that can accept the lack of liquidity of the investment, provided that the expected return is adequate. We further think that employment will also be very favourably impacted by the creation and thereafter the existence of useful infrastructures in many different sectors. Thus, we urge authorities to organise for an appropriate framework that would not only not penalize but positively encourage relevant projects to be financed by long term investors. We consider that the present consultation is an interesting step in the right direction, the more so because authorities do not overlook the need for a fair assessment of the quality of the infrastructure projects and project companies. The final calibration may however need some further flexibility.	
Annex III		
Annex IV		
Annex V		